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No. 82-52

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE
FOR TAX DEFERRED ANNUITY
AND DEFERRED COMPENSATION PLANS,
STATE OF ARIZONA, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and
all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

LAWRENCE J. LATTO
(Counsel of Record)
STEPHEN J. HADLEY
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for the Amicus

Of Counsel:
WILLIAM D. HAGER
General Counsel
American Academy of
Actuaries
1835 K Street, N.W.
Washington, D.C. 20006
(202) 223-8196

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	Page
Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 (1978)	3
STATUTES:	
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*	
§ 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976)	2
I.R.C. § 457 (Supp. IV 1980)	3
OTHER AUTHORITIES:	
American Council of Life Insurance, 1981 Pension Facts	4

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This brief is filed on behalf of the American Academy of Actuaries, as amicus curiae, in support of the petition for certiorari filed in this case. Consent from counsel for both sides has been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The American Academy of Actuaries (the "Academy") was formed in 1965 as a national accrediting organization by three existing national actuarial organizations—Casualty Actuarial Society, Conference of Actuaries in Public Practice, and Society of Actuaries (the "founding organizations"). The Academy and its founding organizations, or their predecessors, have represented the actuarial profession in the United States for over 90 years. There are currently more than 7,000 members of the Academy. A substantial number of these actuaries are engaged in the determination of the value of annuities offered by insurance companies, in the design and administration of employee retirement plans, and in helping to ensure the financial soundness of those plans.

This case involves those provisions of Title VII that make it unlawful for an employer "to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1976). At issue is how this phrase is to be interpreted where part of the amounts paid to an employee in return for services are not received by the employee currently but are received at a later time and may be contingent upon continued employment for a given period or upon how long the employee lives. In this context, "compensation" can mean either the amounts paid or set aside by the employer at the time the work is performed for the purpose of making payments in the future, or the retirement benefits or amounts received by the employee at or after retirement, or, conceivably, both. The issue is a subtle and intricate one. Its correct determination, we believe, requires a full understanding of the relationship between the dollar amounts received by the employee and the cost to the employer of providing those benefits. This relationship is central to the work of the actuary who practices in the pension area.

Actuarial work requires special training and experience and an understanding of a branch of mathematics—actuarial science, which includes the theory of probability and statistics—without which anyone dealing with averages and the classification of risks can fall rather easily into serious error. We are, accordingly, in the unique position of being able to offer the Court accurate information about the structure and operation of employee retirement plans that would be helpful in the consideration, and perhaps essential to the correct resolution, of this case.

REASONS FOR GRANTING THE WRIT

The decision below extends significantly the decision of this Court in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). That case involved a contributory defined benefit pension plan which required greater contributions by women employees than by men. Plans of that kind had almost never been adopted by private corporations and only infrequently by governmental entities. This case involves a voluntary savings and investment arrangement that permits employees of the State of Arizona to accept reduced current compensation in exchange for payments at a later time, a plan generally known as a deferred compensation plan. See I.R.C. § 457 (Supp. IV 1980). These plans are in widespread use and are significant in themselves. The decision below, however, if allowed to stand, will almost surely apply to an even more important class of retirement plans, namely, defined contribution pension and profit sharing plans.[1] It is also very likely to affect the structure of a still broader type of retirement plan,

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[1] It is under these plans that employers provide benefits for similarly situated men and women that have an actuarially equal present value but may be paid to the employees in monthly amounts that are not equal.

namely defined benefit pension plans.[2] It may also apply to still other forms of insured plans.[3]

The practical implications of the application of the decision to these broader classes would be serious. For example, many owners of small businesses and many governmental bodies have adopted defined contribution plans because they believe it essential to fix precisely and in advance the cost of providing retirement benefits for their employees. If the decision is allowed to stand, those employers are likely to refrain from providing benefits in the form of annuity payments that would last for the lifetimes of their employees—something which, had the decision below been different, could have been done without the danger of undesired and unexpected increases in cost. It was precisely those kinds of lifetime annuity benefits, however, that Congress sought to foster by providing favorable tax treatment for these plans. If the decision below stands, many hundreds of thousands, perhaps millions, of employees may well enjoy less attractive retirement benefits because their employers, unable to provide an annuity option without adding to the cost of the plan, will decide to drop the option. In addition, many thousands of employers who had justifiably believed that their plans were fully funded will be required to pay substantial additional amounts.

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[2] Statistics compiled by the American Council of Life Insurance indicate that by the end of 1980 the assets of trusteed pension and profit sharing plans amounted in the aggregate to $256,898,000,000. American Council of Life Insurance, 1981 Pension Facts 19. By far the largest part of this huge sum is held under defined benefit pension plans. These plans are ordinarily adopted by larger and medium-sized corporations. They have, for the most part, provided for pensions in identical monthly amounts for similarly situated retired men and women employees. Title VII is likely to affect such plans to the extent that they provide optional forms of retirement benefits, however, since such annuity options are often based on sex-distinct factors.

[3] See *infra* note 4.

Affected also will be private insurance companies, the efficient conduct of whose businesses requires that the prices charged for the assumption of risks be related as closely as possible to the costs resulting from the several classes of persons transferring those risks.[4]

It may be that Congress adopted a law that compels these results. But the decision below reflects a serious lack of understanding of the subject matter and, for that reason, does not provide the authoritative interpretation of the applicability of Title VII to employee retirement programs that is essential to those engaged, as we are, in the design and administration of those programs. Because *Manhart* applied only to a narrow and not very significant class of plans, it also did not provide that interpretation. This case, however, applies to retirement programs of far greater practical significance and provides the opportunity for such an interpretation. A decision by this Court would bring clarity to an area that is now confused and uncertain.

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[4] A direct result, if the decision below stands, is likely to be a substantial reduction in the business of life insurance companies, resulting from the decreased provision by employers of lifetime benefits. Indirect impacts may be much greater. To take one example, state insurance laws and regulations require that group life and health insurance contracts provide a terminating employee with the right to convert to an individual life or health insurance policy at individual rates used by the insurer. These individual rates are always sex-distinct, that is, they are different for males and females for the same coverage. An insurer could not merely create a set of unisex rates for such conversion while using sex-distinct rates on other individual insurance since that, too, would be in violation of state law. If the decision below extends to such plans, and there is reason to believe that it might, escape from this quandary will be difficult and would result in a major change in the way insurance companies conduct their business, notwithstanding the disclaimer of such a result in *Manhart*.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE J. LATTO
(Counsel of Record)
STEPHEN J. HADLEY
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for the Amicus

Of Counsel:
WILLIAM D. HAGER
General Counsel
American Academy of
Actuaries
1835 K Street, N.W.
Washington, D.C. 20006
(202) 223-8196

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